UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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JOHN SAWYER PRESTON, ET AL,

Plaintiffs,

v. 11 CV 02556 (WHP)

FT 17 LLC, d/b/a Veloce Club,
FREDERICK TWOMEY,

Defendants.

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New York, N.Y.
February 6, 2013
3:40 p.m.

Before:

HON. WILLIAM H. PAULEY III,

District Judge

APPEARANCES

JOSEPH HERZFELD HESTER & KIRSCHENBAUM
Attorneys for Plaintiffs
BY: DANIEL M. KIRSCHENBAUM
MATTHEW D. KADUSHIN
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POHL LLP
Attorneys for Defendants
BY: DAVID M. POHL
KRISTINE A. SOVA

(In open court)

THE DEPUTY CLERK: Case of Preston, et al v. FT 17 LLC, et al.

Appearances for the plaintiff.

MR. KIRSCHENBAUM: Maimon Kirschenbaum, Matthew Kadushin, and Denise Schulman for the plaintiffs.

Good afternoon, your Honor.

THE COURT: Good afternoon.

THE DEPUTY CLERK: Appearances for the defendant?

MS. SOVA: Kristine Sova.

MR. POHL: David Pohl.

MS. SOVA: On behalf of the defendant.

THE COURT: Good afternoon.

I take it that the other folks at counsel table are the parties in this case, that is, the three plaintiffs and the principal of the defendant?

MR. KIRSCHENBAUM: That's right, your Honor.

MS. SOVA: That's correct, your Honor.

THE COURT: All right.

First, thank you for agreeing on short notice to change the time for the conference. I've been working on the trial of an antitrust case, and I now fully expect to complete that case on Friday, so that we will be in a position to proceed to trial on Monday.

The purpose of today's conference is to address the

dueling motions for summary judgment, the motions *in limine* in this case, and to lay down some ground rules for the upcoming trial.

I think I'd like to turn first to the summary judgment motions. And, Mr. Kirschenbaum, do you want to be heard with respect to the plaintiffs?

MR. KIRSCHENBAUM: Sure.

Your Honor, given that there are so many issues at hand, would your Honor like me to just present it or do you want to ask me questions or --

THE COURT: Well, you state in your brief as a matter of law that when an employer pays an employee an amount of money that bears no relation to tips, that payment cannot constitute a distribution of tips.

Is there case law that stands for that proposition or are you offering that simply as a matter of logical reasoning?

MR. KIRSCHENBAUM: Your Honor, I think that the *Chan*, *Copantitla*, *Cao*, and *Cross* cases all support the notion that if there's some other basis for how the employees' salaries calculated, be it straight-up salary or an hourly pay, regardless of whether that money conceptually can be traced back to tips, that is not considered a distribution of tips.

There's also the CFR, which admittedly is sort of in a different context, but defines the term "salary" to be a predetermined payment that does not vary, be it on a weekly or

a daily basis.

THE COURT: What about the fact that the barbacks were regarded by everyone as tipped employees?

MR. KIRSCHENBAUM: Well, not to throw a question back at your Honor, but what does your Honor mean by "regarded," as everyone -- regarded by who as tipped employees?

The barback may or may not have been tip-eligible employees. I think that both parties in this case agree that that's a factual question to be determined by the jury.

But what I'm saying is even if the barbacks were waiters, and they were completely tip-eligible employees, the fact of the matter is that they did not receive tips. And so that defendants had this benefit of being able to engage in some sort of contractual relationship with these barbacks which says no matter what, you will be guaranteed your $100 or $120 a shift; but then you just can't have it both ways and then call that a distribution of tips.

THE COURT: Isn't it clear here that everyone understood that tips were being set aside for the barbacks?

MR. KIRSCHENBAUM: Absolutely not, your Honor.

Plaintiffs understood that the barbacks were paid shift pay, which was either a $100 a shift or $80 a shift or somewhere roughly between 70 and $140 per shift. I can't present anything on the record today about what the barbacks understood, but presumably the barbacks, who got paid the same

exact amount of money per shift each shift, thought that that's what they were getting, not an amount that varied based on tips.

Similarly, plaintiffs understood how the barbacks were paid, and that's what they understood the tip pay to be.

And finally, Mercedes Kaiser, the woman who ran defendant's payroll, understood that she was supposed to multiply a barback's shift pay by the amount of shifts he worked and pay him that amount irrespective of what the tips were.

I don't think there was -- in fact, I think the understanding was precisely to the contrary.

THE COURT: Are you telling me that when the plaintiffs wrote out the percentage of their tips they set aside each night for named barbacks, that they had no understanding that the barbacks were receiving their tips?

MR. KIRSCHENBAUM: Sitting here today, the plaintiffs still believe that the barbacks were not receiving their tips. The barbacks were receiving shift pay.

If your Honor for a second -- I can read to you from --

THE COURT: Why would your clients write out percentages of tips that are set aside each night?

MR. KIRSCHENBAUM: Because that's what defendants required them to do. My clients made good money despite the 30

percent reduction of their tips, and they kept their jobs.

That being said, they explicitly understood that barbacks got a set pay. Sometimes --

THE COURT: Didn't they understand that the barbacks were being tipped --

MR. KIRSCHENBAUM: No, your Honor.

THE COURT: -- with that 30 percent?

MR. KIRSCHENBAUM: The barbacks were not being tipped with that 30 percent. The barbacks were getting paid 100 -- let's call it 100 per shift or 80 per shift or 120 per shift. Sometimes that was more than the tips that were left, which defendants point out many times, sometimes it was less than the money that the bartenders put in the safe-deposit. Either way, under no fathomable interpretation of tips did these barbacks receive tips. It simply makes no sense to say someone was receiving tips, and then they get no more money or less money ever for the entire period of plaintiffs' employment.

THE COURT: How do your clients know that?

MR. KIRSCHENBAUM: Defendants' records.

THE COURT: Pardon me?

MR. KIRSCHENBAUM: Defendants' records and defendants' testimony.

THE COURT: How do your clients know it at the time that they were setting aside 30 percent of their tips for the barbacks?

MR. KIRSCHENBAUM: They spoke to the barbacks. Barbacks told them. I don't think it was a secret.

Defendants have weekend payroll reports that simply show that the barbacks were making the same amount of money each shift.

Ms. Kaiser was specifically questioned at her deposition. If all of the Bar Veloce restaurants, all of the restaurants in Guilietta Management made a ton of money one week, did the bartenders make any -- did the barbacks make any more money than they are guaranteed? And the answer was no.

So I mean the bartenders' understanding was exactly consistent with the reality, which was the employer's understanding, which is that barbacks' money did not vary when there was more tips or less tips; and, thus, they bear no relation at all to tips.

THE COURT: What case law do you have where the issue of willfulness and liquidated damages was decided on summary judgment?

MR. KIRSCHENBAUM: I'm pretty confident that the *Copantitla* case -- I'm fairly confidential informant that the *Copantitla* case was decided on summary judgment. I can take -- if your Honor could give me a second.

THE COURT: Take your time, because it sounds like a hedge.

MR. KIRSCHENBAUM: Your Honor, if I said it, it must

say it somewhere.

Frankly, your Honor, I have a case -- I don't know if it's cited in our briefs -- against *Mocha Asian Bistro*. Again, I don't know if that's cited in our brief. But in that case, willfulness was decided on summary judgment in the Eastern District of New York. And similarly --

THE COURT: Who in the Eastern District decided the *Mocha* case?

MR. KIRSCHENBAUM: Judge Mauskopf, your Honor.

Good faith has been decided on -- liquidated damages under the good faith standard has been decided on summary judgment, even here, in this *Copantitla v. Fiskardo*, which was decided, I believe, by Judge Holwell.

In this other case that I'm talking about, Judge Mauskopf awarded it. I only happen to know that because I was plaintiff's counsel on that case.

THE COURT: How do you respond to the defendants' arguments that tips aren't to be taken into consideration for spread-of-hours pay?

MR. KIRSCHENBAUM: The only published decisions on that, your Honor, are *Chan* and *Gin v. Specific Buffet House*. And both of those cases decided exactly the opposite of what defendants say, which is they did not count tips in determining whether plaintiffs were entitled to spread-of-hours damages.

THE COURT: Thank you, Mr. Kirschenbaum.

MR. KIRSCHENBAUM: You're welcome.

THE COURT: Ms. Sova?

MS. SOVA: Yes, your Honor.

THE COURT: Let's pick up with that point that I was just concluding with.

Do you contend that tips are not to be included in the calculation of whether plaintiffs' total wages exceeded minimum wage for purposes of establishing entitlement to spread-of-hours pay?

MS. SOVA: Your Honor, we are contending that tips are part of compensation and should be factored into the spread-of-hours analysis. We've cited quite a few decisions in our moving papers, and again in a reply brief that was submitted today that establishes that district courts, New York State courts, the Department of Labor, all consider tips to be compensation or wages, and those terms are used interchangeably.

What I find most compelling is that the New York Labor Law awards liquidated damages when wages are withheld.

THE COURT: Right.

But do any of these decisions you're referring to, do they address spread of hours?

MS. SOVA: None of those decisions do address spread of hours. The decisions that I do cite state generally the proposition that if compensation exceeds minimum wage,

overtime, and the spread-of-hours requirement, then no additional spread-of-hours pay is due.

THE COURT: But are there any decisions addressing the spread of hours?

MS. SOVA: The only decision that addresses spread of hours is the *Chan* decision that plaintiffs' counsel has referred to. But I believe that there are three distinguishing characteristics of that case.

Chan was decided before January 1st, 2011, when the law changed. There's a decision out of the Northern District of New York that acknowledges that when that law changed, the lawmakers made clear that certain people were no longer to be excepted from the law. And my read there, my logical conclusion, is that if you're now no longer excepting people prior to January 1st, 2011, you could except people.

I think another distinguishing characteristic --

THE COURT: All that change in the law did was to say that minimum wage doesn't matter anymore.

MS. SOVA: It said, I believe, rate of pay didn't matter anymore as the wages grew higher.

And again, you know, the difficulty here is that sometime the term "wage" is used, sometime the term "compensation" is used. But I think what's really important to look at, because this is the analysis of the Department of Labor, and the district court and state court decisions that

analyzed spread-of-hours pay, is they want to make sure that employees get a minimum. And in our moving papers, because of the guarantee that was in place at the defendant's establishments, that minimum was always met by virtue of the guarantee.

We're not dealing with a situation here where we have hourly employees who make tips, and those tips fluctuate day-to-day or week-to-week because of, you know, some variable factor in the hospitality industry. There was a floor here. And because of that floor, the spread-of-hours pay was always met.

THE COURT: Doesn't rate of pay include tips or not?

MS. SOVA: Rate of pay does not include tips. Employers are allowed to take a tip credit against that rate of pay; but the standard is wages and compensation. And wages and compensation is a much broader term than regular rate of pay, which is typically the hourly wage.

THE COURT: Is the faithless servant doctrine an affirmative defense to the FLSA?

MS. SOVA: It is an affirmative defense to the FLSA. There is a decision. I can't remember right now, but I will find out in a minute, it's either in the Southern District or the Eastern District of New York that says that the faithless servant doctrine provides a setoff defense to FLSA. Specifically, *Markbreiter v. Feinberg*, 2010 U.S. District Lexus

7549, states that the faithless servant doctrine gives rise to a defense on a theory or recoupment -- theory of recoupment or setoff in wage and hour actions under the FLSA and New York Labor Law.

THE COURT: Judge Kaplan never actually applied the setoff defense there, did he?

MS. SOVA: Not to my knowledge, but he did let it proceed.

THE COURT: What if your faithless servant defense caused the plaintiffs to be paid less than minimum wage, don't all workers have a right to a minimum wage under the FLSA in state law?

MS. SOVA: I think that's the struggle here, your Honor.

MR. POHL: Your Honor, if I may.

THE COURT: Mr. Pohl.

MR. POHL: I've come across that issue. I think a variation of what you're saying is some cases have raised the issue of whether the faithless servant doctrine is in itself illegal because it contradicts the provisions of the FSLA. And I looked into that, because obviously that would be important here, and there is not any decision that I've been able to find.

THE COURT: We've been looking into it, too.

As a matter of sense, the FLSA is a remedial statute.

And the faithless servant doctrine could undermine what is established as a public right by the FLSA.

MR. POHL: Well, your Honor, I would say in response that there is no indication in the case law that the FLSA or New York Labor Law was intended to abrogate this common-law doctrine that has evolved over decades in the State of New York. It's been applied in various labor law contexts under ERISA, the FLSA.

And so I understand the issue that we're facing, but I can say only that I don't believe there is any decision actually holding that; and there's no authority for that proposition. Even the courts have wrestled with it; it has never been held, to my knowledge.

THE COURT: Are the defendants contending that activities such as drinking on the job and soliciting customers entitle the defendant to a setoff of damages for failure to pay overtime?

MS. SOVA: Your Honor, I think that the same conduct, whether it's cast as a faithless servant theory entitling the defendants to a damages setoff, the same factual inquiry actually goes to the heart of plaintiffs' claims. It goes to the heart of whether these employees were actually working. And under faithless servant --

THE COURT: That goes to the hours worked question.

MS. SOVA: Sure. Exactly.

And if these employees are conducting conduct that is not to the benefit of the employer, then, by definition, that conduct is not hours worked and they shouldn't be compensated for that time.

For example, the after-hours bar, where defendants didn't receive any income from the drinks that were given away for free to customers, that's certainly not to my client's benefit.

THE COURT: But how would you apply such a setoff? I mean let's suppose that one of the plaintiffs helped himself to a bottle of wine. Does that permit the employer to say, all right, I won't pay you $30 for hours you actually did work because you helped yourself to an expensive bottle of chardonnay, or maybe not so expensive.

MS. SOVA: I don't think that's precisely what we're contending here, your Honor. We're looking at their conduct, that they were -- whether they were taking limes from the defendant's establishment and using the establishment's goods for their own profit is what we're really looking at.

THE COURT: How will you apply the setoff?

MS. SOVA: How would we apply the setoff?

THE COURT: My example, and maybe we're going to hear testimony at the trial that one of the plaintiffs pops a cork and helps himself and his friends to a bottle of your client's finest wine. How would I apply that setoff?

MS. SOVA: Our contention is those times they were not actually working, because they weren't working for the benefit of the employer; they were work for their own personal benefit and reaping personal profit off of that: Giving away items for free that belong to defendants to generate tips, cash tips, that they kept for themselves.

MR. POHL: Your Honor, if I may.

THE COURT: Yes, Mr. Pohl.

MR. POHL: I think an important point here is that the faithless servant doctrine and the setoff that it affects is not a precise dollar-for-dollar measurement. More so when an employee is identified as a faithless servant, all compensation for that time period is forfeited.

So there is an issue here that we have with plaintiffs as to when -- what that time period might be. But it's not measured by a specific bottle that was $12; therefore, I don't have to pay you $12 over here. It's more so a time period during which the employee was faithless. And as a result, under the common law doctrine, all compensation for that period is forfeited.

THE COURT: All right.

But are you asking me to hold that if someone talks to a customer about a new job, they should lose their pay for the night?

MR. POHL: No, your Honor.

What we are asking the Court to hold is that it's a pattern and practice of behavior that over time is a pattern of disloyal conduct. And it's not simply the example you gave, which is obviously a rather de minimis example, but, rather, this is running an after-hours bar that's cash only for friends, and the bar is closed to the public, but friends get to stay and drink for free and eat for free on defendant's dime.

THE COURT: Right.

But wouldn't you have to quantify this for the jury?

MR. POHL: Well, there is a threshold that I believe is defined in the case law as substantial disloyalty. It's something somewhat amorphous. But it's a question of fact for the jury what constitutes substantial disloyalty.

THE COURT: But how is the jury supposed to hang a number on this?

MR. POHL: If I'm understanding you correctly -- I'm sure you'll tell me if I'm not -- I don't believe they have to hang a number per se, more so a time period.

So we say, Okay, they were faithless during this time period; and, therefore, compensation -- regardless of what that number might be for this time period -- is forfeited.

Now, we believe that under the case law -- and I cited some of these cases in our *in limine* motion -- because this is a single contract, it is not segmentable into discrete tasks,

it's one big time period. And it's not one of these cases where courts have apportioned pay. They would say, Okay, you were disloyal for this week, but not this week; so, therefore, we can apportion it, apportion the setoff.

THE COURT: So what would that mean? No pay for the week you were disloyal?

MR. POHL: In this case, it would be no pay at least for all the time after the period of disloyalty. And we would contend that -- well, we would contend it would be during the course of the entire employment.

Now, we don't have a counterclaim in this action, so we can't go affirmatively and grab that money back; but we do believe that our defense entitles us to not have to pay any further compensation to a faithless servant during the period of employment.

THE COURT: If I were to disallow any payment for a week of disloyal conduct and any week after that, wouldn't that be countenance in a flagrant violation of the minimum wage laws?

MR. POHL: I don't think so, Judge. I don't think so because this gets back to the conversation we were having before.

I understand the sort of facial appeal of that. But I don't believe it's found in the law, and I believe, in fact, it is not the law, because no court has ever done it.

There's a history of labor law in New York that's very strong for the employee, obviously. And the faithless servant doctrine has been employed in a whole host of contexts. And there's no indication anywhere that in the passing of these statutes that are at issue here, they were intended to abrogate these decades of common law.

THE COURT: Let me return for a moment to a question I asked earlier.

Do the defendants contest that tips are not to be included in the calculation of whether plaintiffs' total wages exceeded minimum wage for purposes of establishing entitlement to spread-of-hours pay?

MS. SOVA: Your Honor, our contention is that the tips should be included in the definition of wages or compensation for purposes of making that calculation and determining --

THE COURT: Do you have any case law to support that?

MS. SOVA: No case law to support it.

We do have -- again, I cite to the New York Labor Law that defines wages and applies liquidated damages, penalties in the context of wages; "wages," again, synonymous with "compensation."

This law makes no mention of the term "tip" or "gratuity," but courts have consistently held that liquidated damages are available for withheld tips. It naturally follows that if liquidated damages are available for withheld tips,

then tips are also wages and compensation, and that's why it should be factored in.

THE COURT: All right. Thank you.

MS. SOVA: Thank you.

THE COURT: Mr. Kirschenbaum, do you want to address the plaintiffs' argument about the definition of compensation?

MR. KIRSCHENBAUM: Well, I mean the definition of compensation is relevant for all kinds of different topics.

Just to start out, the spread-of-hours statute as it was written before 2011 did not even address this idea that if you made the minimum wage or more than the minimum wage, you weren't entitled to spread of hours. It simply said every employee is entitled to spread-of-hours pay if their spread of hours lasts for a period X to period Y.

Now, this new topic was something that was based on legislative intent, and it's a case law found at exception to the spread-of-hours rule. And the only place to look to define how wages should be defined for purposes of spread of hours is to look at the case law regarding spread of hours. And the two cases which I've cited to your Honor, one of them being the *Chan* case, which says: "In this case, however, the plaintiff's total weekly compensation did not exceed the minimum wages due because the money paid from the banquet fee -- "

THE COURT: Slowly.

MR. KIRSCHENBAUM: "Because the money paid from the

banquet fee, which made up the difference between plaintiff's wages and the minimum wage, was tips, not wages."

I just think the law is clear. It's not really -- it's not an open issue.

THE COURT: All right.

Anything further on the motions for summary judgment?

MS. SOVA: Nothing here, your Honor.

MR. KIRSCHENBAUM: The faithless servant argument, I mean I don't know -- the real problem with it is to the extent it stays in, aside for all that possible ambiguities and unknown that your Honor has already identified, we simply -- other than a couple of random statements set forth in a declaration, we would be totally disadvantaged by not having been able to take any discovery on that topic.

We specifically asked about it at depositions, and we would just be unfairly handicapped. And obviously it's not pled in the complaint. There's an affirmative defense that says the word "setoff" with no reference of the faithless service doctrine, and no facts behind the faithless service doctrine.

THE COURT: But you understand that the defendants have the right to rebut hours worked, right?

MR. KIRSCHENBAUM: Sure.

Defendants are not rebutting hours worked; they are saying plaintiffs are not entitled to be paid for their time,

if I heard correctly. They are not entitled --

THE COURT: They are saying your clients are not entitled to be paid for their time because they weren't working, they were partying with their friends at the defendants' expense.

MR. KIRSCHENBAUM: That's true, that that is what defendants are saying. But Mr. Twomey was asked at his deposition, Are there any witnesses that will testify about plaintiffs' hours worked? And Mr. Twomey said no.

This is news that's sprung on us at the last minute.

To the extent defendants have a parade of witnesses that are going to testify about some completely unidentified topic, again, I think we'd be unduly prejudiced.

THE COURT: No, but other witnesses were disclosed to that effect, and documents were produced, weren't they?

MR. KIRSCHENBAUM: Documents to the effect that my clients were partying? Those documents were produced after the close of discovery. And after those documents were produced, Mr. Twomey still testified that there were no other witnesses that could testify about plaintiffs' hours worked.

THE COURT: And weren't there disclosures about stolen wine?

MR. KIRSCHENBAUM: Their last round of initial disclosures?

MR. KADUSHIN: Your Honor, the issue is that -- first

of all, there are two issues, your Honor.

One is the issue of stolen wine, there's nothing in the record that our clients stole any wine. The issue is that our client -- anytime there's an issue of question of comp or not comp, our clients filled out a receipt, wrote the receipt out, and said comp. Defendants had this in their possession throughout the entire litigation.

What they are saying is despite the fact that our clients wrote down that they were comping people and turned these documents over and handed them in every night, two months or three months after the close of discovery, oh, now we didn't know until then. They were in possession of all these documents throughout the entire litigation; they turned them over in October, right; and then said -- then asserted a new defense. And just that's not what they are saying. They are not saying our client stole any wine; they are saying our clients filled out a receipt, wrote the receipt comp, and the defendants didn't give them permission to do it.

Regarding, your Honor, the question of the hours worked, just real clear, we're not saying defendants can't put on witnesses to testify about that they weren't working, but that's a general setoff. It doesn't get into this question of a jury instruction on the issue of disloyalty.

Defendants are free to bring in any witness they want to say that our clients' working, but to ask of this setoff on

the disloyalty is a completely different topic from the question of was our client working.

And similarly, your Honor, if our client is having a conversation with a customer during hours of operation, he's working during those hours. The notion that you can distinguish, you know, I'm talking to one customer over here about whether they like the Mets, and another customer over here about whether they do this, that somehow the content of my conversation prevents me from working is not a setoff argument. That goes into a much more complicated question of regarding whether or not this is a disloyalty issue.

And all the questions that your Honor is asking about whether it undermines the FLSA, whether they are preemption issues, these are subjects that would have been briefed at summary judgment had the defendants actually pled, right, the faithless servant doctrine as an affirmative defense. If they put it in specific facts, this issue would be ripe for summary judgment, we would have moved for summary judgment on this issue, and based upon your Honor's -- we would have prevailed on this issue.

We had no basis for developing this record during the course of the discovery because they just wrote setoff. And the Second Circuit is very clear, your Honor, that they have to put in more than just a setoff, and they have to put the underlying facts.

THE COURT: All right.

Look, it's time to cut the Gordian Knot.

The parties have filed fully briefed motions for summary judgment, and I've heard oral argument. As indicated at the outset of this conference, this Court is now prepared to rule on the motions for summary judgment.

Summary judgment is appropriate where there's no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. So says Rule 56(c).

On the uncontested issue of whether Defendant Twomey was plaintiffs' employer as that term is defined under 29 U.S.C., Section 203(d) of the FLSA, and New York Labor Law, Section 190, summary judgment is granted to the plaintiffs.

On the uncontested issue of whether defendants Giulietta Management Corp., Veloce Club, Veloce Bar Chelsea, Bar Carrera East Village, Bar Veloce East Village, and Veloce Pizzeria constitute a single employer under the FLSA and New York Labor Law, summary judgment is granted to plaintiffs.

On the issue of whether defendants are liable to plaintiffs for unpaid wages, including overtime wages, this Court finds that there are issues of material fact regarding how many hours plaintiffs worked, and that this issue must proceed to trial. But the Court finds that plaintiffs are entitled to a three-year statute of limitations period for their wage and hour claims under the FLSA in light of the

undisputed facts regarding defendants' record-keeping practices and their practice of generally paying plaintiffs for ten hours per shift, regardless of how many hours plaintiffs noted on nightly cashout sheets. See the Kaiser deposition transcript at 23 and defendants' Rule 56.1 counterstatement at Paragraph 50.

These undisputed facts show that any violations of the FLSA are willful as a matter of law.

The Court also finds that plaintiffs are entitled to the applicable liquidated damages for any unpaid wages under the FLSA and New York Labor Law.

As Judge Raggi noted in *Barfield v. NYC Health & Hospital Corp.*, 537 F.3d 132 at 150 (2d Cir. 2008), an employer's burden to avoid liquidated damages is "difficult," and "double damages are the norm and single damages the exception."

On the issue of whether defendants are liable for failure to pay spread-of-hours pay under New York law, summary judgment is granted to plaintiffs. Defendants are liable for spread-of-hours pay for any of plaintiffs' shifts on or after January 1, 2011 that exceeded ten hours. For any shifts prior to January 1, 2011 that exceed ten hours, defendants are liable for spread-of-hours pay if plaintiffs' total wages, including hourly wages and any money defendants furnished pursuant to the compensation guarantee were less than the statutory minimum

wage, plus spread-of-hours pay. Any compensation derived from tips is not to be included in this calculation.

This Court also finds that plaintiffs are entitled to the applicable liquidated damages for any failure to pay spread-of-hours pay. There's no dispute that defendants never paid plaintiffs a spread-of-hour wage, and, in fact, remained ignorant of the obligation to do so until Mr. Twomey sought legal advice on his employment obligations for the first time at the outset of this litigation. Defendants' 56.1 statement at Paragraph 53, and the Twomey deposition transcript at 76 to 77. As such, defendants had no awareness of any uncertainty in the law regarding whether spread-of-hours pay was due to employees who made more than minimum wage, and they cannot claim a good-faith basis for failing to pay such a wage when it was due.

On the issue of whether defendants violated Section 203(m) of the FLSA, and Section 196-d of the New York Labor Law by illegally retaining plaintiffs' tips, summary judgment is granted to plaintiffs. The undisputed facts indicate that defendants illegally retained 25 to 30 percent of plaintiffs' tips to pay what was essentially an operating cost, namely the compensation guarantee owed to barbacks. *See, e.g. Cao v. Wu Liang Ye Lexington Restaurant, 08* CV 3725 (DC) 2010 WL 4159391 at *4 (S.D.N.Y. September 30, 2010).

There, Judge Chin found illegal tip retention where

tip deductions "were either kept by defendants or were used to pay the busboys' wages, thereby impermissibly transferring money from waiters to busboys to support the busboys' base pay."

The barbacks were tipped employees in name only. The undisputed facts show that in reality, they were paid a flat wage, as their compensation was "not subject to reduction because of variations in the quality or quantity of the work performed." *See* 29 CFR Section 541.602, and defendants' 56.1 statement at Paragraphs 79 to 84.

Further, this Court finds that plaintiffs are entitled to a three-year statute of limitations under the FLSA because defendants' actions are willful as a matter of law and the defendants are entitled to applicable liquidated damages for their tip retention claims.

So for the foregoing reasons, plaintiffs' motion for summary judgment is granted in part and denied in part. And the defendants' motion for summary judgment is denied.

Now, let me turn to the motions *in limine*.

Let me begin with the plaintiffs' motions *in limine*.

First, plaintiffs move to preclude defendants from offering any evidence related to the faithless servant doctrine, noting that defendants failed to assert the faithless servant doctrine as an affirmative defense in their answer.

On December 21, 2012, this Court denied defendants'

request to amend their answer to include the faithless servant doctrine as a counterclaim. The Court's decision was based on the knowledge that there is a concurrent state action between the parties in which defendants are able to assert this state-law-based doctrine as a counterclaim.

Defendants have offered no support for their contention that the faithless servant doctrine is a legally cognizable defense to an FLSA action other than Judge Kaplan's conclusion in *Markbreiter v. Barry L. Feinberg, M.D., P.C.*, that the faithless servant doctrine "gave rise to a partial defense on a theory of recoupment or setoff" where defendants had specifically pled it in their answer. *See Markbreiter* at 2010 WL 334887 at *2 (S.D.N.Y. January 29, 2010).

But *Markbreiter* later settled. And there appears to be no other case in this Circuit in which the faithless servant doctrine has actually been used to offset damages in a federal wage and hour action. In fact, this Court notes that there appear to be substantial unsettled questions of law regarding whether a state common law doctrine can effectively relieve defendants of their federal and state statutory obligations to pay minimum wage for every hour worked. *See e.g. Donovan v. Pointon*, 717 F.2d 1320 at 1323 (5th Cir. 1983); and *Nebraskaland, Inc. v. Sunoco, Inc. (R&M)*, 2010 WL 5067962 at *4, (E.D.N.Y. 2010).

Further, the Court finds defendants' boilerplate

setoff defense insufficient to plead what is essentially a breach of fiduciary duty claim, and notes that if defendants themselves considered their faithless servant defense adequately pleaded, they would not have moved this Court for relief to amend their answer to add an identical counterclaim in the first place. As such, defendants are precluded from advancing the faithless servant doctrine as an affirmative defense for the wage and hour claims.

However, defendants will still be permitted to introduce the evidence they marshaled in support of their faithless servant defense for the purpose of rebutting plaintiffs' evidence on the open issue of how many hours the plaintiffs worked.

By way of example, defendants are free to introduce evidence that plaintiffs closed defendants' wine bars early to entertain their friends in order to show that plaintiff worked fewer than ten hours on any given night. But the Court will not permit defendants to argue that in keeping the bar open, plaintiffs forfeited the right to compensation for hours worked that are "tainted by the dishonesty and perhaps more broadly" under the faithless servant doctrine. See *Markbreiter* 2010 WL 334887 at *2.

Next, plaintiffs move to preclude certain witnesses and witness testimony on topics they allege were not disclosed to them pursuant to Rule 26; namely, testimony from barbacks on

their own job duties, and any testimony regarding the faithless servant defense, especially from witnesses newly disclosed to them.

With regard to the duties of the barbacks, the motion is moot because the duties of the barbacks are no longer at issue in this case.

With regard to any testimony from previously undisclosed witnesses offered in support of defendants' faithless servant defense, I note that I just ruled such evidence will only be permitted for the purpose of showing how many hours plaintiffs worked.

While defendants do not appear to have complied in full with Rule 26, I do not find that exclusion of any witness under Rule 37 is warranted. "Imposing sanctions is a matter committed to the district court's discretion, and the preclusion of evidence is a drastic remedy." *Harkabi v. SanDisk Corp.*, 2012 WL 2574717 at *4, (S.D.N.Y. June 20, 2012).

It strikes this Court that witnesses such as Mr. Maness will offer nothing but more of the same regarding alleged afterhour parties and the like, because defendants apparently made plaintiffs aware of similar witnesses in their initial disclosures, and produced documents related to these issues in October of 2012. This Court finds that plaintiffs have received adequate notice of defendants' intent to use such evidence such that defendants' failure to disclose may be

deemed harmless for Rule 37 purposes. But if plaintiffs truly believe they are unduly prejudiced by the addition of Mr. Maness as a witness, this Court will grant them leave to depose Mr. Maness for no more than an hour before trial begins on Monday, or before he's called as a witness by the defendants.

Finally, plaintiffs seek to preclude evidence of defendants' contempt motion, which this Court held in abeyance pending the outcome of trial. Plaintiffs' motion is granted. The contempt motion is irrelevant to the claims at issue pursuant to Rule 402. And even if it were relevant, it would be unduly prejudicial under Rule 403, because the fact of a plaintiff violating a court-ordered stipulation could send a false message to the jury that the Court itself is unhappy with the conduct of plaintiffs or their counsel. Therefore, there is to be no mention of the contempt motion or any of the allegations contained within it, including the plaintiff Preston's violation of the May 2012 stipulation and any allegation suggesting wrongdoing by any counsel.

Now, let me turn to defendants' *in limine* motions.

First, the defendants seek to admit a summary of phone records, nightly cashout sheets, and payroll-related documents totaling roughly 5700 pages.

I take it, Mr. Kirschenbaum, that this motion is unopposed?

MR. KADUSHIN: Yes, your Honor.

THE COURT: Defendants' motion is granted, and the summaries will be admitted into evidence.

Next.

Defendants seek permission to play video segments of plaintiffs' depositions and/or read from the transcript of plaintiffs' depositions during their opening statement. Defendants note that the scope and extent of an opening is within the control of the trial court, citing *United States v. Millan-Colon*, 836 F. Supp. 1007 at 1014 (S.D.N.Y. 1993).

This Court denies the defendants' motion, especially where the plaintiffs are not "unavailable" under Rule 804, and will undoubtedly be called to testify live subject to full cross-examination. Allowing counsel to introduce deposition testimony in an opening statement is inappropriate and unwarranted.

And I'll turn in a few moments to how the trial will be conducted, but I fix time limits on opening statements and closing arguments, and counsel will abide by them.

Now, finally, defendants seek to preclude the plaintiff Deyarza from refusing to testify in this action pursuant to a nondisclosure agreement he signed with another employer. Defendants' motion is granted. And Deyarza will be called upon to testify notwithstanding the nondisclosure agreement.

It appears that nondisclosure agreement relates only to trade secrets and proprietary information. Further, where employment nondisclosure agreements involve events in the workplace that are not privileged, but are relevant to potential violations of federal law, this Court will not permit plaintiff to remain silent. *Cf. Chambers v. Capital Cities/ABC, 159* F.R.D. 441 at 444 (S.D.N.Y. 1995).

Now, let's turn to the conduct of this trial.

The parties advise me in the joint pretrial order that the case will take three days to try. In view of this Court's rulings, do you still anticipate that it is going to take three days to try?

MR. KIRSCHENBAUM: Your Honor, defendants have disclosed about 24 witnesses. So if they plan on putting all of those witnesses up --

THE COURT: How long is it going to take the plaintiff to present the plaintiffs' case? Don't tell me about the defendants.

MR. KADUSHIN: Your Honor --

THE COURT: You know what? I'm going to tell you something. There have been so many stones cast back and forth between all of you and among all of you, I'm not going to permit the kinds of things that have gone on and that I saw going on in these depositions, especially from Mr. Preston. That is not going to go on in this trial or you're going to all

regret it.

MR. KIRSCHENBAUM: Understood, your Honor.

THE COURT: How long is it going to take for the plaintiffs' case?

MR. KADUSHIN: May I ask you a question, your Honor?

Does your Honor envision us on the 196-d issue, if we could perhaps reach a stipulation with the defendants on the damages, it would be significantly less. I'm just not sure -- we haven't had time to think about what we have to introduce that testimony or not.

Given that, we would put our clients on. Our clients, I would imagine, each of their directs taking approximately an hour. And I don't know if I have to put a summary witness in or not for the other issues, your Honor.

MR. KIRSCHENBAUM: Your Honor, if I could just sort of clarify the scope of that question.

When we spoke last Friday, we spoke about amending the jury instructions so that just decide is there liability on issues XYZ, and then how many hours of work pursuant to the tip credit, how much was retained in the 25 to 30 percent of tips.

Now that your Honor has granted summary judgment, does your Honor still want us to make this case now or do you want --

THE COURT: This is a case now about hours worked.

MR. KIRSCHENBAUM: Yes. But there still are some

issues which would need to be decided regarding the damages on the issues on which your Honor just decided liability. I think probably if we had a little more time, we could probably stipulate on a lot of the things now that would otherwise go to trial.

THE COURT: Are there issues of fact relating to the tips?

MR. KIRSCHENBAUM: There probably won't be. We could probably agree on that.

THE COURT: It would make sense to stipulate to that.

MR. KIRSCHENBAUM: We'd love to.

THE COURT: It would make greater sense to settle the case.

MR. KIRSCHENBAUM: At this point, certainly would.

Does your Honor want us to sit down and see if we could stipulate? I think we might need some time, only because I don't --

THE COURT: Of course I want you to sit down and try to stipulate. And I would let you use the jury room here, but it's full of antitrust documents. You can work right here.

MR. KIRSCHENBAUM: Sure.

What I'm getting at is it sounds like the only liability question or the only real open question is how many unpaid hours there are.

That being said, in order to reach an actual verdict,

we still also need to determine even for how many spread of hours shift there were, how much money was in the 25 to 30 -- how much money it was. It was just simply -- we were before planning on having a jury decide that; but now that the liability is decided, I think we'd probably agree. We could probably agree to that. We might even be able to come up with a settlement compromise as to how long each shift lasted so that we take a little hit on that and defendants give up a little bit on that. I'm guessing we could probably resolve this whole thing.

We're sort of under the gun, and we have jury instructions submitted to your Honor right now which really don't reflect the decision we just got.

What I'm saying is I think we need a little bit more time.

THE COURT: You're going to prune them, okay.

MR. KIRSCHENBAUM: Yeah.

THE COURT: This is a three-day trial. You submitted 60 pages in jury instructions.

MR. KIRSCHENBAUM: I think at this point there is going to be a lot less in jury instructions. I think if we could --

THE COURT: There is going to be a lot less.

MR. KIRSCHENBAUM: If we could -- my guess is is that if we weren't under the gun to get ready for trial by Monday

morning, we'd probably have this resolved by next week.

THE COURT: Well, you're under the gun because we're picking a jury on Monday morning. Because from what I've seen -- and it's absurd -- both sides here, all they want to do is hurl mud at each other. That's all they want to do.

It will be a very entertaining trial for the jury. Very entertaining. They will hear about all of the shenanigans going on, okay. And I'm not going to put up with any shenanigans from these witnesses and the parties. There will be none. Because the moment it happens, you will regret it.

MR. KIRSCHENBAUM: Fair enough, your Honor.

The primary liability issues are pretty much decided. So I really am hopeful -- and I haven't heard anything from defendants' counsel, but I'm pretty hopeful we should be able to stipulate at this point.

The 25 to 30 percent that was retained in tips which your Honor just granted summary judgment in our favor comprises, I would say, 70 -- together with the tip credit, comprises more than three-quarters of the damages in this case. So at this point, I mean something big just changed.

THE COURT: Look, at most this is a three-day trial; correct?

MR. KADUSHIN: That's correct, your Honor.

THE COURT: All right.

We're going to pick the jury on Monday morning.

You can have a seat, gentlemen.

We're going to pick a jury on Monday morning. I'll impanel eight jurors for this case.

I will ask each side to stipulate here and now to a unanimous jury of as few as six, meaning that if we lose one or two jurors over the course of a three-day trial, which will be a four-day trial, because Tuesday, February 12 is a court holiday, and we won't be sitting on Lincoln's Birthday, that we'll still go forward with a verdict so long as we have six jurors and they are unanimous.

Is that stipulated?

MR. KADUSHIN: Yes, your Honor.

And if there were eight jurors, it would still be unanimous.

THE COURT: If all eight, it has to be unanimous. But a jury as few as six.

MR. KADUSHIN: We have no objection to that, your Honor.

THE COURT: Any objection?

MS. SOVA: We're fine with that, your Honor.

THE COURT: All right.

So what I'll do is we will put 14 jurors in the box. Each side will have three peremptory challenges. They will be exercised in alternating rounds, with the plaintiffs going first in the first round, the defendants going first in the

second round, and the plaintiff going first in the third and final round.

If you don't exercise a challenge in a given round, it's deemed waived; but you don't forfeit your right to exercise a challenge in a subsequent round. If all six peremptories are not exercised, then the lowest seated eight persons in the box will comprise the jury.

You'll find that I am very liberal when it comes to excusing jurors for cause. So I will sometimes do that just *sua sponte*, because obviously my job is to keep nuts off the jury, and every once in a while they pop up.

Are there any questions about how jury selection is going to proceed?

MR. KADUSHIN: No, your Honor.

MS. SOVA: No.

THE COURT: All right.

We will proceed immediately after jury selection to opening statements.

How long do the parties request for opening statements?

MR. KADUSHIN: Approximately 12 minutes, 12 to 13 minutes, your Honor.

THE COURT: That's fine.

How about the defendant?

MS. SOVA: I would say anything under half an hour,

but probably 20 minutes.

THE COURT: No. Fifteen minutes max each. I'll give each of you a two-minute warning, meaning when you have two minutes left, I will gently interrupt and tell you to begin to conclude your opening statement. When we hit 15 minutes, you'll be seated and we'll proceed to the next stage of this case, which is going to be testimony.

Your exhibit list is not particularly illuminating to me, but all documents should be premarked, exchanged. I don't want to hear, except on cross-examination for impeachment purposes, Oh, Judge, I've never seen this before. I don't know what counsel's got. Mark, premark, all of your exhibits, even exhibits that you're going to use on cross. We're not going to sit here and mark exhibits in front of a jury.

We will try the case each day from 10 a.m. until 5 p.m. We will take a luncheon recess from 1 until 2 each day. And we'll take a short mid-morning recess of about ten minutes, and a mid-afternoon recess of about ten minutes.

I would say that it's just about imperative that we complete the taking of evidence, closing arguments, and instruct the jury by Thursday afternoon. That will give you the three days that you need, because we won't be working on Tuesday. Assuming the jury is deliberating on Thursday, then we will sit on Friday during deliberations.

Obviously, to the extent that any party has religious

obligations on Friday afternoon, we will conclude at an appropriate time so that people can get to where they need to be by Shabbos. If the jury is still deliberating on Friday at the close of business, we will resume on Tuesday, because the following Monday is another court holiday, and there will be no services here.

So it's very important that we get this case tried next week in the time that's allotted for it, because otherwise we're going to run into all kinds of trouble.

Do the parties understand?

MR. KIRSCHENBAUM: Yes, your Honor.

MR. KADUSHIN: Yes, your Honor.

MR. KIRSCHENBAUM: One quick thing.

Could we have until maybe -- your Honor was planning on addressing this, but could we have until Monday to submit revised jury instructions that are in accordance with your decision today?

THE COURT: Yes.

MR. KIRSCHENBAUM: Okay.

And hopefully to the extent we're able to stipulate to a whole bunch of stuff before then, it won't be in there.

THE COURT: Right.

MR. KIRSCHENBAUM: Right.

THE COURT: Should be.

MR. KIRSCHENBAUM: Right. I agree.

THE COURT: This jury instruction should be just laser-like.

MR. KIRSCHENBAUM: How many hours were unpaid. How many hours were unpaid I think is really the primary issue at this point.

THE COURT: That's it. Assuming that there's an agreement with respect to the tip pool.

MR. KIRSCHENBAUM: Yes.

THE COURT: And then we'll just present fact questions on a simple verdict sheet. I don't need a, what, nine-page verdict sheet you submitted?

MR. KIRSCHENBAUM: It will be short, your Honor.

THE COURT: It will be.

MR. KIRSCHENBAUM: Short enough.

THE COURT: And clear.

MR. KIRSCHENBAUM: For anyone to understand.

THE COURT: All right.

Now, are there any other issues that counsel want to raise?

I wanted the parties here --

MR. KIRSCHENBAUM: I'm sorry?

THE COURT: I wanted the parties here so that they all, each of them, understands exactly what the Court's position is. And I want each one of them to understand that I am not for one moment going to put up with the kind of nonsense

that I read in some of these depositions. And there will be a jury there judging each of you. And there's enough bad conduct to go all around.

And if the plaintiffs open the door with respect to the conduct of your client, if that door is opened, I'm going to let the defendants walk right through it. And then the jury will really have something to talk about.

Now, anything further from the defendants?

MS. SOVA: No, your Honor.

THE COURT: All right.

You're free to remain here in the courtroom and discuss this matter this evening. I'm going to be around. If there's anything that I can do to facilitate your discussions, you'll call upstairs, all right.

I'm going to be here.

I'll also tell you just for planning purposes that all of this electronic equipment will be removed from the courtroom before Monday morning, and the extra set of tables will also be removed. It's just that the antitrust case that I have going on, I have 22 people in the well of the courtroom and everybody is billing. And they will all be back here tomorrow morning bright and early to continue our work days, which are from 10 a.m. until 6:30 p.m.

So the courtroom will be reconfigured.

Have a good evening.

If you need me, I'm here.

Stipulate to facts or, better yet, settle the case.

There are weaknesses all around this case, notwithstanding the Court's determinations as a matter of law with respect to the summary judgment issues.

I'll see you on Monday.

MR. KIRSCHENBAUM: Thank you, your Honor.

MR. POHL: Thank you, Judge.

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